

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 86 OF 2022

NGENDA FAUSTINE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Shinyanga at Shinyanga.]

(Hon. U.S. Swallo PRM)

dated the 5th day of August, 2022

in

Criminal Case No. 14 of 2022

JUDGMENT

2nd November 2023 & 23rd January, 2024.

S.M. KULITA, J.

This is an appeal from the District Court of Shinyanga. The appellant herein above was charged with Gang Rape, contrary to the provisions of section 131A(1)(2) of the Penal Code [Cap 16 RE 2019]. It is alleged that on the 2nd day of February, 2022 at Tambukareli area within Shinyanga

Municipality in Shinyanga Region the Appellant herein, **NGENDA FAUSTINE** and one **BONIPHACE CHRISTOPHER**, jointly had sexual intercourse with the victim herein namely HC (the real name is hidden) aged 18 (eighteen) years old without her consent.

Upon the matter being heard at the trial court, the Appellant herein was found guilty of RAPE, contrary to section 130(1)(2) of the Penal Code and sentenced to serve 30 (thirty) years imprisonment. His co-accused was found not guilty, hence acquitted.

Aggrieved with both conviction and sentence, the appellant herein lodged this appeal with 5 (five) grounds as follows;

1. That, the evidence of the victim (PW1) and PW3 collide each other.
2. That, in its analysis the trial court faulted the evidence of the victim but still it used the same to convict the appellant.
3. That, the defense case was not considered by the trial court.
4. That, the trial court's proceedings are tainted with serious irregularities.
5. That, at the District court the case was not proved beyond all reasonable doubts.

The appeal was argued through oral submissions. While the Respondent (Republic) was represented by Ms. Caroline Mushi, the Appellant was unrepresented.

In his submission to support the appeal the Appellant prayed for his grounds of appeal to be adopted as the submissions for his appeal. He just added by praying for the appeal to be allowed by setting aside conviction and sentence that had been imposed against him.

On the other hand, the Republic, through the State Attorney, Ms. Caroline Mushi, conceded the appeal. In supporting the appeal, the said Counsel submitted the reasons which include the fact that, the offence that the Appellant had been convicted with, that is **Rape**, contrary to **section 130(1)(2) of the Penal Code** is not a cognate offence for **Gang Rape** which falls under the provisions of **section 131A(1)(2) of the Penal Code**. Hence, the trial court was wrong to convict the appellant herein for **Rape** as an alternative verdict to **Gang Rape**.

My analysis on this matter is to the effect that, as a general rule, the alternative verdict should be a minor/lessor offence as compared to the charged one. As such **section 302 of the Criminal Procedure Act**

provides that, the offence of Attempt to Commit a certain offence is the alternative verdict to the full commission of that particular offence, and that, one can be convicted of it (attempt to commit the said offence) though he was not charged with it.

Apart from Attempts, there are some offences whose alternative verdicts have been directly mentioned in law. **Section 304 of the Criminal Procedure Act** provides for the alternative verdicts for Rape, and the said verdicts have been mentioned therein. As for the offence of Rape itself, it has not been mentioned as the cognate offence for Gang Rape. Hence, the doctrine of alternative verdict was wrongly applied by the trial Magistrate.

In view of what I have endeavored to explain above, I agree with the State Attorney that the Appellant was wrongly convicted and sentenced by the trial court for the offence of Rape while the charge sheet reads that he was charged with Gang Rape.

This ground is sufficient to dispose of the matter in its entirety. In the event, I hereby declare **the appeal meritorious, hence allowed**. I accordingly quash the conviction and set aside the sentence that had been imposed by the trial court against the appellant herein. The appellant should

be immediately released from the Prison House, unless he is held for any other lawful cause.



S.M. KULITA
JUDGE
23/01/2024

DATED at **SHINYANGA** this 23rd day of January, 2024.



S.M. KULITA
JUDGE
23/01/2024

